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In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

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EDITOR'S NOTE

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REPLY BRIEF FOR THE UNITED STATES

The Solicitor General, on behalf of the United States, respectfully files this reply brief to respond to an argument made by the other appellees with which we do not agree. Specifically, we respond herein to the argument by appellees Synar, et al. (Synar) and National Treasury Employees Union, et al. (NTEU) that Section 251 of the

Balanced Budget and Emergency Deficit Control Act is unconstitutional because the assignment to an administrative officer of the responsibility for determining the amount of the spending reductions required by the Act is an impermissible delegation by Congress of the "legislative Powers" vested in it by Article I, Section 1 of the Constitution. In our view, the district court correctly rejected that contention (J.A. 38-55).

We argue in our principal brief that under the doctrine of separation of powers, the Comptroller General cannot perform the administrative functions assigned to him by Section 251 (i) because he is subject to removal by Congress and is an officer of the Legislative Branch, and (ii) because those functions are so central to the responsibilities of the President that they must be performed by an Officer of the United States who serves at the pleasure of the President. If the Court agrees with that submission, it need not consider the broader argument advanced by Synar and NTEU that the Act results in an unconstitutional delegation of legislative power *irrespective* of the identity of the official to whom the responsibility for executing the Act is assigned.[1] Because of our view that the

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[1] The district court acknowledged that it was unnecessary to reach the unconstitutional delegation issue in light of its holding that Section 251 is unconstitutional because of the role of the Comptroller General in executing the deficit reduction provisions. The district court nevertheless elected to afford this Court the benefit of its views on the delegation question because of the requirement in Section 274(c) that judicial resolution of the validity of the Act be expedited to the greatest extent possible and the provision in Section 274(b) for a direct appeal to this Court. J.A. 38-39.

However, there is no occasion for this Court also to address the delegation issue if it holds Section 251 unconstitutional because of the role of the Comptroller General. In that event, the fallback procedures prescribed by Section 274(f) of the Act will automatically be invoked. Section 274(f) contemplates that the report of the Directors of OMB and CBO that was submitted to the Comptroller General

role contemplated for the Comptroller General renders Section 251 unconstitutional in its present form, we shall proceed here by assuming that this defect would be eliminated by vesting in an Office properly constituted to receive them the responsibilities that Section 251 now vests in the Comptroller General.

A

The principle that Congress may not "delegate" its legislative powers to the Executive Branch is one aspect of the separation of powers under the Constitution. It derives from the demarcation mandated by the Constitution between the "legislative Powers" vested in Congress by Article I, Section 1 and the "executive Power" vested in the President by Article II, Section 1. The legislative authority is the power to "make all Laws" (Art. I, § 8, Cl. 18), which are then carried into effect by officers of the Executive Branch. Invocation of the nondelegation principle in a particular instance rests on a determination that Congress has authorized the Executive not simply to carry a law into effect, but actually to "make" the law as well. This aspect of the separation of powers is quite different from others the Court confronts.

Many of this Court's cases that have considered the separation of powers under the Constitution have involved aggrandizement or encroachment by one Branch at the ex-

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will be submitted to a joint committee of Congress and be enacted as a joint resolution, which in turn will trigger a sequestration order by the President in the same manner as the report issued by the Comptroller General pursuant to Section 251(b). See U.S. Br. 5, 57-58. Because the sequestration order and spending reductions under the fallback mechanism would result from action by Congress itself, the fallback mechanism raises no question of an unconstitutional delegation of legislative power.

pense of another. See, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 946-951 (1983); *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57-60, 87 (1982) (plurality opinion); *Buckley* v. *Valeo*, 424 U.S. 1, 120-141 (1976); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Other of the Court's cases have involved claims that one Branch has impermissibly interfered with the performance or integrity of another within the area of its assigned responsibilities. See, *e.g.*, *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 439-455 (1977); *United States* v. *Nixon*, 418 U.S. 683, 705-713 (1974); *United States* v. *Sioux Nation*, 448 U.S. 371, 390-407 (1980); *id.* at 424-434 (Rehnquist, J., dissenting). In those circumstances, the Court is frequently called upon to enforce the "self-executing safeguard[s]" (*Buckley*, 424 U.S. at 122) embodied in the Constitution to guard against excesses by the respective Branches.[2]

The non-delegation doctrine addresses the opposite situation: not a claim that Congress has arrogated to itself power that properly belongs to another Branch, but rather a claim that Congress has abdicated its own "legislative Powers" to the Executive. The Constitution does not contain self-executing safeguards to protect against the latter potential, because the structure of the Constitution rests on the premise that the "opposite and rival interests"[3] represented in the separate Branches will be actively asserted in order to jealously guard each Branch's own

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[2] The submission in our opening brief that Section 251 is unconstitutional because it assigns executive functions to an officer who is removable by Congress, not the President, concerns such an encroachment by Congress on the Executive; it also concerns the application of the particular constitutional safeguards—the Appointments Clause (Art. II, § 2, Cl. 2) and the corresponding power of removal—that serve to protect the integrity and autonomy of the Executive Branch against such encroachment.

[3] *The Federalist No. 51*, at 322 (J. Madison) (C. Rossiter ed. 1961).

prerogatives. *Buckley*, 424 U.S. at 122-123. Because of the constitutional presumption that the Members of the Legislative Branch act in the interest of that Branch and as representatives of the people, and because Congress may at any time rescind unduly broad statutory authority vested in the Executive simply by passing a new law, this Court has properly been reluctant to conclude that Congress has impermissibly yielded its own power to the Executive. Nevertheless, the Court has identified certain fundamental attributes of the legislative power that must be exercised by Congress itself and that may not be "delegated" to the Executive Branch. *Field* v. *Clark*, 143 U.S. 649, 692, 694 (1892).

"The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society" (*The Federalist No. 75,* at 450) (A. Hamilton) (C. Rossiter ed. 1961). Congress may either prescribe such rules with great precision or, instead, "commit something to the discretion of the other departments." *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). The Legislature must be afforded broad lattitude in deciding upon the discretion to be left to the Executive Branch, especially in light of Congress's express power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers (Art. I, § 8, Cl. 18). By virtue of the Necessary and Proper Clause, the degree to which administrative discretion is appropriate for carrying a substantive legislative policy "into Execution" is itself a matter of legislative policy for Congress to resolve. The Court accordingly has held that "[i]n determining what [Congress] may do in seeking assistance from [the Executive] branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928).

Under this constitutional framework, the "essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." *Yakus* v. *United States*, 321 U.S. 414, 424 (1944). "These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective." *Id.* at 424. "If Congress shall lay down by legislative act an intelligible principle to which the [administrative body] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton*, 276 U.S. at 409. Accord *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 10 n.7.

As we now show, in the Balanced Budget and Emergency Deficit Reduction Act, Congress has unambiguously announced the basic legislative policy of reducing the federal deficit and has articulated "intelligible principle[s]" for the administrative implementation of that policy. The Act therefore does not result in an unconstitutional delegation by Congress of its legislative powers.

B

1. Contrary to the contention of appellees Synar (Br. 22-23) and NTEU (Br. 14-21), Congress plainly performed the "essentials of the legislative function" (*Yakus*, 321 U.S. at 424) when it passed the 1985 Act. It enacted into law a requirement that the budget deficit be reduced to $0 by 1991; and to achieve that end, Congress specified a "maximum deficit amount" for each of the next five fiscal years. § 201(a)(1) (J.A. 104).[4] Thus, Congress has made

[4] Adding a new paragraph (7) to Section 3 of the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. 622.

the critical "determination of the legislative policy" (*Yakus*, 321 U.S. at 424) and "has itself established the standards of legal obligation" (*A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 530 (1935)).

Congress further prescribed the manner in which the necessary deficit reductions will be achieved for each fiscal year in the absence of any intervening law passed by Congress to achieve those reductions in some other manner. The Act first establishes an administrative mechanism for determining whether the projected budget deficit for a particular fiscal year will exceed the statutorily prescribed "maximum deficit amount" by more than $10 billion (or $0 in fiscal years 1986 and 1991). § 251(a)(1)(B) and (b)(1) (J.A. 109, 117).[5]

If the projected deficit exceeds the applicable statutory maximum by more than the amount allowed, the reductions in budgetary resources then must be distributed according to detailed standards in the Act. One-half of the reductions must be made under accounts for defense programs and the other half under accounts for non-defense programs. § 251(a)(3)(B) (J.A. 110-111). Up to 50% of these overall reductions are to be achieved, according to a prescribed formula, by cancelling certain non-exempt "automatic spending increases"[6] that are scheduled to take effect during the fiscal year. § 251(a)(3)(C) (J.A. 111). Increases in benefits under Title II of the Social Security Act, the Railroad Retirement Act, and certain other programs are specifically exempted from the reduction requirements. § 255 (J.A. 143-148). In addition, special rules are provided to limit the amount of reduc-

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[5] The method of making that determination is discussed in Point C, at pages 14-16, *infra*.

[6] The term "automatic spending increase" is defined in Section 257(1)(A) (J.A. 159-160). Those increases are typically tied to the Consumer Price Index or a comparable index. See § 256(a)(1) (J.A. 148-149).

tions that may be taken from such programs as guaranteed student loans, Medicare, child support enforcement, federal pay, unemployment compensation, commodity credit, and migrant and Indian health (§ 256 (J.A. 148-159)). In these various provisions, Congress has furnished considerable guidance for implementing its basic legislative determination that the budget deficit shall not exceed the statutorily specified maximum for each of the next five fiscal years.

2. Despite the statutory provisions just discussed, appellees Synar and NTEU contend (Synar Br. 22-23; NTEU Br. 14-21) that Congress, by adopting an automatic deficit reduction procedure, has declined to make the difficult political choices involved in reducing the federal deficit. As the district court concluded, this charge is simply "not true" (J.A. 54):

> To the contrary, [Congress] has decided to impose the severe constriction of federal spending necessary to produce a balanced budget by fiscal year 1991, it has established an intricate administrative mechanism to address that goal, and it has specified in meticulous detail which program budgets will be reduced in order to achieve that result, and by how much.[7]

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[7] For the reasons stated in the text, this case is quite different from *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490 (1981), in which two dissenting Justices believed that the Act in question resulted in an unconstitutional delegation by Congress of its legislative powers. *Id.* at 543-548 (Rehnquist, J., dissenting). In that case, Congress provided for the Secretary of Labor to establish health standards that would assure certain protections "to the extent feasible." The dissenting Justices were of the view that Congress had not been able to make the difficult policy choices and had left the whole matter, not merely the triggering factual determinations, in the hands of the Secretary. Here, by contrast, Congress has made the "hard policy choices" (*id.* at 543, quoting *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 671 (1980)

Moreover, the formula in the Act in fact reflects significant policy judgments by Congress, such as the allocation of reductions equally to defense and non-defense programs, the exemption of Social Security and Railroad Retirement benefits, similar exemptions for low-income and other programs, special treatment for specific programs, and the requirement that reductions come first from automatic spending increases. These provisions are the product of precisely the sort of debate, judgment, and compromise of the interests of competing factions that the Framers intended to be accomplished in the legislative process. See *The Federalist No. 70*, at 426-427 (A. Hamilton); *Chadha*, 462 U.S. at 948-951.

The validity of the approach Congress adopted is not undermined by the fact that, subject to specified exceptions and priorities, the spending reductions required by the Act will be uniformly applied. § 251(a)(3)(E)(iv)(I) (J.A. 113). The choice of the uniformity itself reflects the exercise of a legislative judgment by Congress that the burdens of the budget reduction process should be borne proportionately by the various government agencies and the public at large.

Against this background, the argument by appellees Synar and NTEU that Congress has failed to make difficult policy choices cannot be premised on the view that Congress has impermissibly "delegated" those policy choices to administrative officers by affording them complete freedom to select which government programs will bear the burden of deficit reductions and to what extent. See page 13, *infra*. As we have shown, the Act itself prescribes the manner in which the reductions must be allocated. Appellees Synar and NTEU's objection there-

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(Rehnquist, J., concurring in judgment)) by prescribing overall deficit maximums and allocating the necessary reductions in expenditures among various programs.

fore must instead be to Congress's own determination to prescribe *by law* an automatic reduction in the deficit over the next five years, rather than to leave the matter entirely to the enactment of separate and more tailored laws in this and future years. See NTEU Br. 14-21. Indeed, appellee Synar even goes so far as to contend that the Act was passed for the "improper" purpose of enabling Congress to "evade its lawmaking responsibilities"—which he describes as "mak[ing] specific decisions to cut specific programs or enact specific tax increases" (Synar Br. 23, 25, 28, 30).

Contrary to this contention, however, nothing in the Constitution requires Congress to make "specific," program-by-program judgments on these questions, and there was nothing "improper" about Congress's decision not to do so in this instance. Whether to approach the problem in general legislation of several years' duration, or instead to enact a series of more limited laws, is committed entirely to Congress's discretion as a matter of legislative policy. Resolution of that question by *Congress* obviously presents no issue of "delegation" of legislative power to the Executive. Moreover, Congress has preserved the prerogative, as it must, to enact appropriations and other laws that achieve the 1985 Act's deficit reduction targets in some other manner or supersede on a permanent basis the 1985's Act's system of deficit reductions.

3. Appellee Snyar also contends that the Act results in an unconstitutional delegation of legislative power because it involves what he labels a "core function of Congress"—"the power of the purse" (Br. 32-33). In making this argument, he relies in particular on the constitutional limitation that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" (Art. I, § 9, Cl. 7). See also NTEU Br. 10. However, that Clause was intended merely to negate the existence of an *inherent* right in the Executive to draw money from the

Treasury in the absence of a law passed by Congress. See *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937). The Clause does not impose any unique limitation on the authority of Congress to pass a law that vests the Executive with broad discretion in the expenditure of appropriated funds,[8] just as it does not grant Congress any unique right to appoint or control the Officers of the United States who are responsible for executing such an appropriations law. See U.S. Br. 34-35. Rather, the reference to "Appropriations made by *Law*" establishes that Congress's lawmaking prerogatives and the separation-of-powers limitations on those prerogatives are the same with respect to the "power of the purse" as they are with respect to Congress's other legislative powers.

Nor does appellee Synar cite any authority for the application of a unique non-delegation principle because of the assertedly "core" nature of the subject matter involved. To the contrary, in *Lichter* v. *United States*, 334 U.S. 742, 778-779 (1948), the Court observed that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." Consistent with this view, in *J.W. Hampton*, the Court sustained against a charge of impermissible delegation a statutory provision that authorized the President to increase or decrease import duties in certain circumstances. Although it was argued that the taxing power was distinguishable from other power under which Congress had conferred broad

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[8] In fact, appropriations statutes often have afforded broad discretion to the Executive. See, *e.g.*, Act of Mar. 26, 1790, ch. 4, § 3, 1 Stat. 105 ("the President is authorized to draw from the treasury a sum not exceeding ten thousand dollars, for the purpose of defraying the contingent charges of government"). By contrast, where the Framers intended to impose limitations on Congress's power to confer broad authority on the Executive with respect to the expenditure of appropriated funds, they did so expressly in the Constitution. See Art. I, § 8, Cl. 12 ("but no Appropriation of Money to that Use [to raise and support Armies] shall be for a longer Term than two years").

authority and discretion on the Executive, the Court perceived "no such distinction" (276 U.S. at 409). It explained: "The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise" (*ibid.*).[9] That same principle also enables Congress to vest the Executive with broad discretion in the implementation of legislative policies regarding the expenditure of appropriated funds.

C

Finally, appellees Synar and NTEU contend (Synar Br. 34-38; NTEU Br. 21-28) that the Act results in an unconstitutional delegation of legislative power because it vests unduly broad discretion in the officers responsible for executing the deficit reduction requirement, without adequate legislative standards to guide their decisions. We do not quarrel with the proposition that the determinations made by the Comptroller General pursuant to Section 251 of the Act have a fundamental and pervasive impact throughout the Executive Branch and that judgment, prediction, and discretion are required in the execution of the Act. Indeed, it is for these reasons that we argue in our principal brief that the functions involved cannot be performed by an officer who is subject to removal by Congress and does not serve at the pleasure of the President.

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[9] See also *Chadha*, 462 U.S. at 953-954 n. 16, and *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-544 (1950) (immigration); *United States* v. *Sharpnack*, 355 U.S. 286 (1958) and *United States* v. *Grimaud*, 220 U.S. 506 (1911) (determination of what constitutes a federal crime); *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953) (legislation for the District of Columbia).

But the further notion that the Act is so completely devoid of standards to guide the administrative undertaking that the functions involved cannot be assigned to *any* officer of the Executive Branch is without merit.

We noted in this regard that appellees Synar and NTEU do not argue in this Court, as they did not below (J.A. 47 n.11), that the administrative function of allocating the overall deficit excess among various programs and accounts amounts to the performance of an unconstitutionally delegated legislative power.[10] They instead focus their allegations of standardless "delegation" on the threshold determination of the overall budget deficit. But in that respect as well, Congress has set forth "intelligible principle[s]" to be followed by those executing the Act. *J.W. Hampton*, 276 U.S. at 409.

1. It is settled that Congress may "specif[y] the basic conditions of fact upon whose existence or occurrence * * * its statutory command shall be effective," and it may provide for those facts to be "ascertained from relevant data by a designated administrative agency" (*Yakus*, 321 U.S. at 424-425). See, *e.g.*, *Field* v. *Clark*, *supra*; *The Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382, 388 (1813). The constitutionality of such a law "depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to

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[10] Questions of statutory interpretation and judgment of the sort typically associated with the execution of a law of course will arise in the administrative process of allocating reductions (J.A. 72-73). For example, in his report issued pursuant to Section 251, the Comptroller General disagreed with the OMB/CBO report's exclusion from the sequesterable base of approximately $6.3 billion of unobligated balances for defense programs, and he also disagreed with the position of the Director of OMB that the payment of interest on federally guaranteed bonds issued by the Washington Metropolitan Area Transit Authority was subject to sequestering. See GAO, *Report to the President and Congress: Budget Reductions for FY 1986, Balanced Budget and Emergency Deficit Control Act of 1985*, at 6, 33 (1986).

find[,] but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will" (*id.* at 425). See also *Opp Cotton Mills, Inc. v. Administrator of the Wage and Hour Division,* 312 U.S. 126, 144-146 (1941). Accordingly, no objection will lie in this case under the delegation doctrine simply because the officials responsible for implementing the Act must make determinations concerning the budget deficit for the federal government as a whole and, in doing so, must make projections concerning the state of the Nation's economy.

Moreover, the Act "specif[ies] the basic conditions of fact" on which reductions in outlays are to be based and "sufficiently marks the field within which the Administrator is to act." The Act first establishes a "maximum deficit amount" for each fiscal year between 1986 and 1991. § 201(a)(1) (J.A. 104). It then requires the responsible officer to estimate the anticipated "budget base levels of total revenues and budget outlays" for a given fiscal year, in order to determine whether the projected deficit will exceed the "maximum deficit amount" for that year by more than a specified amount. He also must estimate the rate of real economic growth that will occur during the fiscal year and each of its quarters and the rate of real economic growth that occurred during each of the last two quarters of the preceding fiscal year. § 251(a)(1) and (b)(1)-(2) (J.A. 109, 116-118).

The Act further prescribes specific assumptions that are to be used in calculating the budget base. The responsible officer is directed to assume, with some specified exceptions, both "the continuation of current law in the case of revenues and spending authority" (§ 251(a)(6)(A) and (C) (J.A. 115-116)) and the existence of "appropriations equal to the prior year's appropriations except to the extent that annual appropriations or continuing appropriations for the entire fiscal year have been enacted" (§ 251(a)(6)(B)

(J.A. 115-116)). He is further directed to assume that "expiring provisions of law providing revenues and spending authority * * * do expire, except that excise taxes dedicated to a trust fund and agricultural price support programs administered through the Commodity Credit Corporation are extended at current rates" (§ 251(a)(6)(C) (J.A. 116)). See also § 251(a)(6)(D) (assumptions regarding federal pay and Medicare). The terms "budget outlays," "budget authority," and "deficit" are defined for these purposes by reference to provisions of the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. 622(1), (2) and (6) (§ 257(2), (3) and (4) (J.A. 160-161)), and the term "real economic growth" is defined to mean "the growth in the gross national product during such fiscal year, adjusted for inflation, consistent with Department of Commerce definitions" (§ 257(6) (J.A. 161)).

Thus, the general contours of the calculations are established by reference to assumptions and definitions in this and other Acts. As the district court observed, the nature of the task is given additional content "by reference to years of administrative and congressional experience in making similar economic projections and calculations under the Congressional Budget Act of 1974" (J.A. 50 (footnote omitted); see 2 U.S.C. 602(a) and (f), 632(a), 639(c)). The President, with the assistance of the Director of OMB, also prepares estimates of future expenditures and receipts and submits them to Congress as part of his budget proposal. 31 U.S.C. (1976 ed.) 11; 31 U.S.C. 1105(a)(5) and (6). These pre-existing statutory provisions and the accumulated experience under them supply further guidance to the responsible officer in estimating revenues and outlays and the resulting budget deficit for the next fiscal year. See, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 785-786 (1948); *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947); *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104-105 (1946); *Industrial Union Department* v. *American*

Petroleum Institute, 448 U.S. 607, 682-683 (1980) (Rehnquist, J., concurring in judgment); *Amalgamated Meat Cutters* v. *Connally,* 337 F. Supp. 737, 748 (D.D.C. 1971) (three judge court).[11]

2. Appellees Synar and NTEU object (Synar Br. 34-38; NTEU Br. 22-28), however, to the fact that the estimated federal receipts and expenditures—and, hence, the projected budget deficit—depend to a considerable extent on economic forecasts that are inherently uncertain and about which reasonable minds might differ. But that obvious truth does not disable Congress from vesting the Executive with the requisite authority. To the contrary, this Court repeatedly has recognized that administrative determinations frequently must be based on predictions about inherently uncertain events. See, *e.g., Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Insurance Co.,* 463 U.S. 29, 51-53 (1983); *Baltimore Gas & Electric Co.* v. *NRDC,* 462 U.S. 87, 102-103 (1983); cf. *Chevron U.S.A., Inc.* v. *NRDC,* No. 82-1005 (June 25, 1984). The Constitution permits Congress to call on the Executive "according to common sense and the inherent necessities of the governmental co-ordination" (*J.W. Hampton,* 276 U.S. at 406). And, in fact, this Court in the past has sustained other statutes that assigned comparably broad authority to an executive officer to make determinations that were likewise dependent upon judgments concerning the state of the economy. See *Yakus,* 321 U.S. at 420 (authority "to promulgate regulations fixing prices of commodities"); *Bowles* v. *Willingham,* 321 U.S. 503, 512, 514-515 (1944) (authority to institute rent controls).

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[11] The district court also observed that "the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations" (J.A. 50). See *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 398 (1940) ("Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act.").

Accord *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. at 746-747 (authority of the President to issue such orders and regulations as he deems appropriate "to stabilize prices, rents, wages and salaries").

3. Finally, appellees Synar and NTEU contend (Synar Br. 35-36; NTEU Br. 27-28) that the Act is unconstitutional because it effectively provides for the administrative modification of appropriations laws that will be enacted in the future. But as the district court noted (J.A. 46), this Court on a number of occasions has sustained laws that permitted executive officials to determine when, or whether, a law should take effect. See, *e.g.*, *United States* v. *Rock Royal Co-Operative*, 307 U.S. 533, 577-578 (1939); *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939); *Field*, 143 U.S. at 693; *The Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) at 388. In such cases, Congress's action is properly viewed as "legislating in contingency" (J.A. 46), and it is Congress, not the Executive, that has determined that the future impact of the legislation will be shaped by administrative determinations it has both authorized and limited.[12]

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[12] Appellees Synar and NTEU also argue (Synar Br. 39-41; NTEU Br. 31-32) that the absence of judicial review of the threshold calculations supports a finding of unconstitutional delegation. However, the availability of review by a court has no logical bearing on whether Congress has unconstitutionally delegated *its* power. The importance of statutory standards, emphasized in Justice Harlan's dissenting opinion in *Arizona* v. *California*, 373 U.S. 546, 626 (1963), simply reflects the need to assure a suitable basis for judicial review where Congress has authorized it. Moreover, the only preclusion of review under the Act applies to "economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays" (§ 274(h) (J.A. 166)). Appellees Synar and NTEU concede (Synar Br. 39; NTEU Br. 32) that these are not the types of matters that would appropriately be reviewable by a court in any event. Finally, as the court below pointed

4. Although the nature of the executive task required by the Balanced Budget and Emergency Deficit Control Act does not, in our view, render it an unconstitutional delegation of legislative authority, its character nevertheless does illuminate the distinct separation-of-powers defect in Section 251 that we address in our principal brief. For under Section 251 as now in effect, the Comptroller General—an officer of the Legislative Branch who is removable by Congress, not the President—has been authorized by Congress to make these difficult projections and determinations regarding government-wide receipts and expenditures and the overall budget deficit, and those determinations in turn have a pervasive and binding effect on the execution of the laws by the heads of all departments and agencies of the Executive Branch. Within the central sphere of the "executive Power," such an impact substantially undermines the unity, independence, and responsibility of the President that the Framers deemed essential to the sound execution of the laws and the welfare of the people.

The Balanced Budget and Emergency Deficit Control Act does not result in an unconstitutional delegation of legislative power. However, as explained in our principal brief, the judgment of the district court should be af-

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out (J.A. 53), the exercise of much administrative authority is insulated from judicial review. See, *e.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-464 (1979); *Thompson* v. *Clark*, 741 F.2d 401, 404-405 (D.C. Cir. 1984). See also *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985); *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982).

firmed because Section 251 unconstitutionally assigns to the Comptroller General the responsibility for executing the deficit reduction provisions of the Act.

Respectfully submitted.

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